REASONS FOR DENYING THE PETITIONS

Petitioner Dalton's contention that there is widespread conflict among appellate courts regarding the extent of IGRA preemption rests primarily on a purported conflict between the New York Court of Appeals' decision below and the California Supreme Court's decision in *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585, 981 P.2d 990 (1999) ("*H.E.R.E.*"). But the state constitutional provision applied in *H.E.R.E.* has been amended for the specific purpose of nullifying *H.E.R.E.*'s result. For all relevant purposes, *H.E.R.E.* thus has no continuing force or effect.

The other cases relied on by petitioner Dalton present no conflict with the New York Court of Appeals' decision in either reasoning or result. Indeed, apart from *H.E.R.E.*, all of the cases cited by petitioner as evidence of a putative conflict are in broad agreement with the New York Court of Appeals' view of IGRA and its preemptive effect.

Both petitioners' remaining arguments boil down to the claim that the New York Court of Appeals incorrectly applied settled law and principles of federalism. The decision below, however, was fully consistent with the precedent of this Court. In any event, petitioners' request for error correction does not merit this Court's attention.

I. PETITIONERS HAVE NOT IDENTIFIED A CONFLICT THAT MERITS THIS COURT'S REVIEW

A. The California Supreme Court Decision on which Petitioner Dalton Primarily Relies Has Been Nullified by Constitutional Amendment.

Petitioner Dalton suggests that this Court's review is necessary to resolve a putative conflict between the New York Court of Appeals' decision and *H.E.R.E.* — a California Supreme Court decision that has no continuing force or effect. Dalton Pet. at 11-13. *H.E.R.E.* concerned a challenge to a California statutory initiative directing the governor to enter into certain Tribal-State compacts pursuant to IGRA. The California Supreme Court invalidated the statute, finding it in violation of a state constitutional provision prohibiting "casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e). Despite the express statements in IGRA's text and legislative history indicating Congress's intent to preempt state regulation of Indian gaming, the court held that "IGRA does not exempt gambling on Indian lands from state regulatory laws," and concluded that the state Constitution prohibited California from entering into Tribal-State compacts as directed by the statute. *See H.E.R.E.*, 21 Cal. 4th at 611-12, 981 P.2d at 1008-09.

In March 2000, approximately seven months after *H.E.R.E.* was decided, California voters ratified Proposition 1A, which amended the state Constitution for the specific purpose of nullifying *H.E.R.E.*'s result. As amended, the California Constitution expressly authorizes the governor "to negotiate and conclude compacts, subject to ratification by the Legislature," for the conduct of certain Class III gaming

on Indian lands. Cal. Const. art. IV, § 19(f). It further provides that such gaming is "hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Id.* Since the amendment was ratified, California has entered into at least sixty-two Tribal-State compacts, and "[c]asinos have become the main source of revenue for Indian tribes in California." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 718 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004).

Because the California Constitution can no longer be read to prevent Class III gaming on Indian lands nor prohibit California from entering Tribal-State compacts, *H.E.R.E.* is for all relevant purposes a nullity. A purported "conflict" with a decision that has no continuing force or effect is not a compelling reason meriting this Court's review. *See Yee v. City of Escondido, California*, 503 U.S. 519, 537-38 (1992).[3]

B. The Remaining Cases Relied on by Petitioner Dalton in No Way Conflict with the Decision Below.

Apart from *H.E.R.E.*, petitioner Dalton points to four categories of cases that are putatively in conflict with the

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3. It is far from clear that *H.E.R.E.* was ever actually in conflict with the decision below. The statute invalidated in *H.E.R.E.* directed the governor to enter into Tribal-State compacts for the conduct of, *inter alia*, "banked" casino-style gaming — Class III gaming that was then categorically prohibited by the California Constitution for all purposes and by all persons. *See H.E.R.E.*, 21 Cal. 4th at 605-09, 981 P.2d at 1004-07. Thus, the compacts entered into pursuant to that statute would have resulted in Class III gaming not actually authorized by IGRA. *See* 25 U.S.C. § 2710(d)(1)(B). The New York Constitution, in contrast, permits the playing of a wide variety of banked casino-style Class III games by charitable or religious organizations.

decision below: (1) state high court decisions concluding, as the New York Court of Appeals did in *Saratoga*, that a governor may not enter a Tribal-State compact without legislative authorization; (2) *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005), which did not even address IGRA's Tribal-State compact procedure; (3) decisions from the Eighth and Tenth Circuits recognizing, as the New York Court of Appeals did below, that IGRA does not compel a State to enter a Tribal-State compact; and (4) federal appellate decisions concerning an issue that the court below expressly declined to reach. None of these cases conflicts with the decision below in any respect.

Petitioner Dalton first relies on three state Supreme Court decisions, *Srader v. Verant*, 1998-NMSC-25, 125 N.M. 521, 964 P.2d 82 (1998); *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992); and *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280 (R.I. 1995). *See* Dalton Pet. at 12. Those cases held (or reaffirmed) that a governor may not execute a Tribal-State compact on behalf of a State without legislative authorization to do so. The New York Court of Appeals held precisely the same thing in *Saratoga* — which the decision below recognizes as good law, *see* Dalton Pet. App. at 7a, 20a; indeed, in *Saratoga*, the court expressly noted its agreement with the very decisions that petitioners cite as giving rise to a putative conflict. *See Saratoga*, 100 N.Y.2d at 824, 798 N.E.2d at 1061 (noting that the New York Court of Appeals "join[s]" New Mexico, Kansas, and Rhode Island in concluding that Tribal-State compacts require legislative authorization).

Petitioner Dalton next relies on *Lac Courte Oreilles*, *see* Dalton Pet. at 12-13, in which the Seventh Circuit upheld a provision of IGRA making Class III gaming on "after-acquired lands" — *i.e.*, Indian lands acquired after IGRA's enactment — conditional on the concurrence of the governor of the State in which the gaming is to occur. *See* 25 U.S.C. § 2719(b)(1)(A). The plaintiff Tribes had argued that because the decision to permit gaming on after-acquired lands is a legislative function, IGRA offended principles of federalism by vesting that function in a state executive officer. The Seventh Circuit explained that "Wisconsin has already established [a gaming policy] through legislation and amendments to the Wisconsin Constitution." *Lac Courte Oreilles*, 367 F.3d at 664. The governor's decision whether to concur to a proposal for gaming on after-acquired lands, the court concluded, "will be informed by the [State's existing] public policy" — a "policy of tolerating gaming on Indian lands" despite Wisconsin's prohibition of casino gaming elsewhere in the State. *Id.* Thus, not only did *Lac Courte Oreilles* say nothing about whether state-law gaming restrictions prevent a State from entering into Tribal-State compacts under IGRA, but its view of the interplay between IGRA and state gaming policy is fully consistent with the decision below.

Third, petitioner Dalton points to *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *vacated and remanded*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); and *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D. Ariz. 1992), as conflicting with the decision below. *See* Dalton Pet. at 13. Petitioner concedes that these cases address not the question squarely presented here but only "closely related issues" — *i.e.*, "that states are not required under IGRA to enter into compacts

with Indian tribes" and that such a requirement, if imposed, would violate the Tenth Amendment. Dalton Pet. at 13. In any event, these decisions are in complete accord with the New York Court of Appeals' view that a State is not compelled to enter a Tribal-State compact, and that if it declines to do so, the terms of Class III gaming on Indian lands would be prescribed without the State's involvement. *See* Dalton Pet. App. at 17a-19a.[4]

Finally, petitioner Dalton contends that "[o]ther circuits have disagreed" not with the decision below but with a Second Circuit decision sometimes read to mean that if a State permits any form of Class III gaming, it must negotiate over all forms of Class III gaming. Dalton Pet. at 13-14; *see also Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1310-11 (10th Cir. 2004) (noting disagreement). Because the New York Court of Appeals expressly declined to reach this question, *see* Dalton Pet. App. at 16a n.4, any conflict over it cannot serve as grounds for granting certiorari in this case.[5]

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4. Because the New York Court of Appeals determined that IGRA does not compel a State to enter a Tribal-State compact, it did not comment on whether such a requirement, if imposed, would violate the Tenth Amendment. *See* Dalton Pet. App. at 17a-19a.

5. Petitioner Dalton notes that this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. __, 125 S. Ct. 1478 (2005) "makes it abundantly clear that state regulatory laws do apply to land that may be owned by Indians in fee simple but which does not enjoy 'reservation' or 'land in trust' status." Dalton Pet. at 11 n.4.

(Cont'd)

II. THE DECISION BELOW WAS CORRECT

Despite petitioners' lengthy attacks on the merits of the New York Court of Appeals' decision, this case was rightly decided below. First, petitioners contend that IGRA unconstitutionally compels States in which Class III gaming is permitted to participate in a federal regulatory program. *See* Dalton Pet. at 2-5, 19-21; Karr Pet. at 2-8, 13-19. No court has agreed with petitioners that IGRA's Tribal-State compact provision violates the Tenth Amendment, and with good reason. IGRA "grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe*, 517 U.S. at 58. But, as the New York Court of Appeals and other courts have concluded, IGRA does not compel a State to use that power. Should a State decline to participate in the compacting process, then the State simply forfeits the opportunity to influence Class III gaming on Indian lands, and the terms of such gaming will be prescribed by the Secretary of the Interior. *See* 25 U.S.C. § 2710(d)(7)(B)(vii); 25 C.F.R. pt. 291; *cf.* Karr Pet. at 16. The Tenth Amendment does not prevent Congress from giving States the option of acting in a field otherwise governed by federal law. *See New York v. United States*, 505 U.S. 144, 167 (1992) (recognizing "Congress' power to offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation"). IGRA is therefore fully consistent with the Tenth Amendment, as courts have uniformly held.

(Cont'd)
That proposition is of no consequence here. IGRA never purports to authorize Class III gaming on territory other than Indian lands, and the New York Court of Appeals did not suggest otherwise. *See* Dalton Pet. App. at 20a n.6.

See Ponca Tribe, 37 F.3d at 1434; *Cheyenne River*, 3 F.3d at 281.

Second, petitioners argue that New York's constitutional restrictions on for-profit gaming preclude Class III gaming on Indian lands pursuant to a Tribal-State compact, notwithstanding IGRA. *See* Dalton Pet. at 4, 17-18; Karr Pet. at 19-21. To the extent this claim turns on an interpretation of the New York Constitution, it is not appropriately addressed to this Court. To the extent the claim turns on an interpretation of federal law, it is incorrect. State gaming law has no force or effect on Indian lands except insofar as Congress may provide. *Cabazon Band*, 480 U.S. at 207. IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands," S. Rep. at 6, 1988 U.S.C.C.A.N. at 3076, and provides that in States, such as New York, which permit Class III gaming for charitable purposes, such gaming may be conducted on Indian lands. 25 U.S.C. § 2710(d)(1)(B). Thus, contrary to petitioners' assertion, New York state law is not a bar to the conduct of Class III gaming on Indian lands. *See* Dalton Pet. App. at 16a-18a; *Northern Arapaho Tribe*, 389 F.3d at 1311-12; *Mashantucket*, 913 F.2d at 1030-31; *cf. United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990).

Third, petitioners urge this Court to hold — "[c]ontrary to the uniform decisions of courts," Karr Pet. at 22 — that IGRA did not incorporate *Cabazon Band*'s criminal/prohibitory-civil/regulatory distinction for Class III gaming. *See* Dalton Pet. at 21-23; Karr Pet. at 21-27. Their position is wrong, *see, e.g.*, Dalton Pet. App. at 15a & n.3; *Mashantucket*, 913 F.2d at 1030; *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1275 & n.6 (D. Idaho 1994); and

in any event irrelevant. The provenance of IGRA's standard for authorizing Class III gaming is of no consequence. The statutory language is clear: Class III gaming may be conducted on Indian lands "located in a State that permits such gaming for any purpose by any person." 25 U.S.C. § 2710(d)(1)(B). Because New York is undisputedly such a State, Class III gaming may be conducted in New York pursuant to a Tribal-State compact.

Finally, petitioners claim that the question presented is of "great national importance." Dalton Pet. at 15; *see* Karr Pet. at 3 ("critical significance"). To be sure, the opportunity that IGRA provides States to influence the conduct of Class III gaming on Indian lands is critical for the States. But not a single State has joined petitioners to seek review of the decision below. That is unsurprising, since the New York Court of Appeals' understanding of IGRA's preemptive sweep is correct and accords with the views of other federal and state courts regarding whether IGRA in fact compels compact negotiation by States. Thus, petitioners have identified no ground that would warrant this Court's departure from its usual practice of refusing to grant certiorari simply to review the merits of the decision below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 05-361 & 05-368

IN THE

Supreme Court of the United States

LEE KARR,

Petitioner,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, ET AL.,

Respondents.

JOSEPH DALTON, ET AL.,

Petitioners,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION FOR RESPONDENT PARK PLACE ENTERTAINMENT CORPORATION

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QUESTION PRESENTED

Whether the New York Supreme Court, the New York Appellate Division, Third Department, and the New York Court of Appeals all erred in holding that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq., preempted the application of New York state law to gaming activities occurring on Indian lands.

PARTIES TO THE PROCEEDINGS

The parties before the New York Court of Appeals included Joseph Dalton, Frank Padavan (individually and in his capacity as a member of the New York State Senate), William Parment (individually and in his capacity as a member of the New York State Assembly), Duane Motley, New Yorkers for Constitutional Freedoms, Ltd., Lee Karr, Mrs. Lee Karr, the Coalition against Casino Gambling, G. Stanford Bratton, the Western New York Coalition Against Casino Gambling, John Ekman, the Presbyterian and New England Congregational Church, Chaskiel Rozenburg, George Pataki (in his capacity as Governor of New York), the State of New York, the New York State Racing and Wagering Board, Park Place Entertainment Corporation (now known as Harrah's Operating Company, Inc.), the New York State Department of Taxation and Finance (Division of the Lottery), Arthur J. Roth (in his capacity as Commissioner of Taxation and Finance of the State of New York), the New York Racing Association, the Finger Lakes Racing Association, Yonkers Racing Corporation, Mid-State Raceway, Inc., and Monticello Raceway Management Inc.

RULE 29.6 STATEMENT

Respondent Park Place Entertainment Corporation, which name was changed to Caesars Entertainment, Inc., was subsequently acquired and merged into Harrah's Operating Company, Inc., a Delaware corporation with its principal place of business in Nevada. Harrah's Operating Company, Inc. is a wholly-owned subsidiary of Harrah's Entertainment, Inc., a publicly traded company.[1]

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[1] Petitioner Karr incorrectly claims that Park Place (now known as Harrah's Operating Company, Inc.) is the parent corporation of the Hilton Hotel Chain. *See* Karr Pet. ii. There is no accuracy to any part of this allegation.

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BRIEF IN OPPOSITION FOR RESPONDENT PARK PLACE ENTERTAINMENT CORPORATION

Respondent Park Place Entertainment Corporation (now known as Harrah's Operating Company, Inc.) ("Park Place") respectfully submits this brief in opposition to the petitions for a writ of certiorari filed in this case.

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals (Karr Pet. App. A; Dalton Pet. App. D) is reported at 2005 WL 1017641 (May 3, 2005). The opinion of the New York Appellate Division, Third Department (Karr Pet. App. B; Dalton Pet. App. E) is reported at 11 A.D.3d 62, 780 N.Y.S.2d 47 (3d Dep't 2004). The opinion of the New York Supreme Court (Karr Pet. App. C; Dalton Pet. App. F) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals was entered on May 3, 2005. Timely petitions for rehearing were denied on July 6, 2005, and the instant petitions were docketed on September 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTES AND RULES

25 U.S.C. § 2710(d)(1) provides:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

STATEMENT OF THE CASE

Petitioners are a collection of anti-gambling interest groups, activists and legislators who seek to invalidate New York State legislation that would permit New York's Governor to enter into tribal-state compacts for the operation of a limited number of Indian gaming casinos in New York State. The claims presented in the instant petitions have been rejected by the New York Supreme Court, by the New York Appellate Division, Third Department, and by the New York Court of Appeals.

At the very most, by their petitions, petitioners have raised an uncomplicated question about federal pre-emption—namely, whether the Indian Gaming Regulatory Act ("IGRA") pre-empts the application of certain state-law limits on gaming to gaming activities occurring on Indian lands. Although petitioners attempt to portray this case as one in which Congress improperly "empowered" state legislatures to enact laws they could not have enacted otherwise, the only question actually presented here is whether New York's general prohibition on "commercial" gambling as it applies to Indian tribes is pre-empted by IGRA—and the answer to this question is plainly yes. Indeed, petitioners' "state sovereignty" arguments ring hollow in light of the fact that IGRA gives the states a power—the ability to exercise some degree of regulation over gaming activities on tribal lands—that they would not otherwise possess under the United States Constitution.

No court, federal or state, has ever accepted the arguments petitioners present here. The decision below does not conflict with any case, and there is simply no reason for this Court to grant review. For these reasons and the other reasons explained here, these petitions should be denied.

• • •

1. Since the days of Chief Justice Marshall, it has been established law that Indian tribes possess powers of inherent sovereignty in our federal system. *See Johnson v. McIntosh*, 21 U.S. 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). It is the Federal Government, through the Indian Commerce Clause and its treaty-making power, *see* U.S. Const. Art. I, § 8, cl. 3; *id.* Art. II, § 2, cl. 2, that exercises authority over Indian tribes and their activities. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). "The whole intercourse between the United States and [Indian] nation[s], is, by our Constitution and laws, vested in the government of the United States." *Id.* at 169 (quoting *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

This Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'" and that "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (citations omitted). Thus, the only way "state laws may be applied to tribal Indians on their reservations [is] if Congress has expressly so provided." *Id.*

2. Until the late 1980s, the law was unclear as to the degree to which gaming activities on Indian lands could be regulated by the states. In 1987, this Court squarely addressed this issue in *California v. Cabazon Band of Mission Indians*.

There, pursuant to ordinances approved by the United States Secretary of the Interior, two federally recognized Indian tribes (the Cabazon and Morongo Bands of Mission Indians) conducted bingo and card games on their reservations in California. *See* 480 U.S. at 204-05. The State of California objected to these gaming operations and sought to enforce against the tribes a California statute that imposed prize limits and limited bingo operators to unpaid members of charities. The tribes brought an action seeking an injunction and declaratory judgment that state laws could not be enforced on their reservations. In response, California argued that it had jurisdiction over the tribes pursuant to Public Law 280, which granted states limited criminal jurisdiction over offenses committed on tribal lands. *See id.* at 204-08.

This Court held that whether a state could enforce its law on an Indian reservation depended on whether the law was "criminal/prohibitory" or "civil/regulatory" in nature. *Id.* at 209. The Court determined that if a state law "generally" were to "prohibit certain conduct," it would fall within Public Law 280's grant of jurisdiction and be considered "criminal/prohibitory." *Id.* However, "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and cannot be enforced on Indian land. *Id.* As the Court explained, the fact that a regulatory law is enforceable by both civil and criminal penalties does not make it a criminal law for purposes of jurisdiction. *See id.* at 209, 211.

Applying this analysis to the Indian tribes' activities in California, this Court found that California law permitted a wide variety of gaming activities, including the state lottery, certain card games, pari-mutuel betting on horse races, and bingo. *See id.* at 210-11. Therefore, the Court ruled that because California "regulates rather than prohibits gambling in general and bingo in particular," the Indian tribes were enti-

tled to engage in such gaming activities on their lands, free of regulation by the state. *Id.* at 211.

3. In the wake of this Court's decision in *Cabazon*, in 1988, Congress enacted IGRA, which incorporated *Cabazon*'s "prohibitory/regulatory" distinction.

In enacting IGRA, Congress recognized that "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue" and that "existing Federal law d[id] not provide clear standards or regulations for [this] conduct." 25 U.S.C. § 2701(1), (3) (2005). Congress also acknowledged "that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands." S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

The primary purpose of IGRA was to address these issues by providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (2005). Congress also sought to establish a framework to regulate Indian gaming and to protect the tribes from criminal and other corrupting influences. *See id.* § 2702(2). To accomplish these goals, Congress devised an elaborate scheme by which different types of gaming would be subject to different degrees of regulation. In addition, Congress established the National Indian Gaming Commission ("NIGC") to act as an independent federal authority to regulate gaming on Indian lands. *See id.* § 2702(3).

IGRA divides gaming into three classes. Class I gaming is limited to social games for nominal prizes and traditional tribal ceremonial games, and is subject only to tribal regulation. *See* 25 U.S.C. § 2703(6) (2005). Class II gaming includes bingo and certain non-banking card games. *See id.* § 2703(7)(A). Banking card games such as "blackjack" and